NO. 35004-5-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ELIJAH MANSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WALLA WALLA COUNTY

The Honorable M. Scott Wolfram, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Flagrant and ill intentioned prosecutorial misconduct, which occurred during the state's presentation of its case, deprived Manson of a fair trial.

2. Manson's lawyer provided ineffective assistance of counsel when he failed to object to the prosecutor's egregious misconduct.

3. Manson's lawyer provided ineffective assistance of counsel when he failed to object to the admission of evidence of Manson's prior contact with officers and his active warrant.

4. Manson's lawyer provided ineffective assistance of counsel when he failed request an instruction to the jury limiting its consideration of Manson's active warrant and prior contacts with police officers.

5. Offering a possession instruction to the jury which included language regarding constructive possession constituted an impermissible comment on the evidence when there was insufficient evidence in the record to support a constructive possession theory.

6. Cumulative error denied Manson a fair trial.

Issues Pertaining to Assignments of Error

1. During motions in limine, the defense moved to exclude cash found in Manson's possession. The state assured defense and the court that it would not be offering the evidence in question. In its case-in-

chief, however, the state asked its officer witness about the cash and admitted the wallet with the contents into evidence. Does the prosecutor's deliberate disregard of the trial court's ruling constitute flagrant and ill-intentioned misconduct incapable of cure such that reversal is required?

2. Did defense counsel render ineffective assistance of counsel for failing to object to the prosecutorial misconduct identified in the preceding issue statement?

3. Did defense counsel render ineffective assistance of counsel for failing to object to the admission of evidence of Manson's prior contact with officers and his active warrant?

4. Did defense counsel render ineffective assistance of counsel for failing to request an instruction to the jury limiting its consideration of Manson's active warrant and prior contacts with police officers?

5. When a constructive possession theory was not supported by substantial evidence, did submitting the constructive possession issue to the jury constitute an impermissible comment on the evidence?

6. Does the cumulative effect of the assigned errors, if the errors do not each themselves warrant reversal, require reversal?

B. STATEMENT OF THE CASE

The state charged Mr. Manson with count I, violation of the uniform controlled substances act (VUCSA) – possession of heroin and count II, VUCSA – use of drug paraphernalia. CP 6-7.

Manson was pulled over on October 5, 2015 when Officer Maiuri saw him driving, recognized him, remembered that he was on a list of people with active warrants, and ordered him out of the vehicle. RP 98, 285. Manson consented to a search of the vehicle where officers recovered a syringe, a digital scale, a spoon, and a wallet with around six hundred dollars inside. RP 146; 294-95. Officers then found a bag of suspected and later confirmed heroin in the amount of 9.2 grams on the planting strip outside of the passenger side of the vehicle. RP 276, 297. At his first trial, the trial court dismissed count II after the state rested. RP 214-15. The jury was unable to reach a verdict as to count I and was discharged. RP 267-71.

Manson was retried. Defense submitted a trial brief in opposition to the state's motions in limine, arguing that defense should be permitted to use a "scales of justice" model in closing argument. CP 16-18. No other issues were addressed in the brief. Defense did make oral motions in limine, moving to preclude any testimony that Manson had been previously convicted of a drug offense, that Manson was a known drug user, that witnesses had had prior contact with Manson where narcotics were found,

any opinion from witnesses that Manson threw the drugs in question, or any reference to the cash that was found in Manson's wallet or any pictures showing that cash in Manson's wallet. RP 40-42; RP 280. Defense did not move to preclude any mention of prior contacts between officers and Manson and did not offer to stipulate to the lawfulness of the traffic stop and detention in order to prevent the jury from hearing about Manson's active warrant. At no point did defense counsel request an instruction to the jury limiting its consideration of Manson's prior contacts with police officers and his active DOC warrant.

During the trial, officers repeatedly testified that they recognized Manson and that Manson had an active DOC warrant out for his arrest. RP 284. Manson was not the registered owner of the vehicle he was driving. RP 313. Officer Maiuri testified that he recognized Manson and "pulled up next to him and told him to pull over because I knew he had a warrant for his arrest." RP 284. He repeated: "I knew he had a warrant or at least a warrant hit. We get lists of people with warrants." RP 285. He continued: "And at this point I was telling him that he had a warrant for his arrest that we were checking on." RP 285. And: "[A]t that point with the handcuffs on I went ahead and told him he was under arrest, that the warrant was confirmed." RP 291. Maiuri also testified that he "advised the other officer, you know, that he – the warrant was confirmed . . ." RP 292. The prosecutor asked Maiuri:

"[Y]ou said that as you were passing by or came to him you recognized him, is there any possibility that somebody might have been [in the vehicle with him]?" RP 368. Maiuri answered, "No." RP 368.

Officer Huxoll testified that he asked Manson if he would consent to a search of the vehicle. RP 417. The prosecutor asked Huxoll, "Why did you do that," to which Officer Huxoll answered, "I know Mr. Manson from previous contacts." RP 417.

During motions in limine, defense moved to exclude reference to or photographs of the cash found in Manson's wallet inside the vehicle. RP 280. The prosecutor said "I don't think we showed any money in the last trial."[1] RP 280. Regardless, he assured defense that it did not "plan on showing any evidence, photos of money." RP 280. The state repeated: "I said I am not offering the cash." RP 281. The trial court concluded: "So I think that takes care of that." RP 281. However, contrary to his previous assurances, the prosecutor moved to admit Manson's wallet and its contents including the cash during Officer Maiuri's testimony. RP 305-06.

[1] He had. Before Manson's first trial, defense had also moved to exclude reference to the cash found in Manson's vehicle and equating that cash to drug dealing. RP 41-42. The prosecutor assured the defense that it would not be offering that testimony. RP 42. However, during Officer Maiuri's testimony, the prosecutor did in fact show him a photograph of the cash found in Manson's wallet and asked him to explain what the photograph was. RP 145-46. When Officer Maiuri answered that the photograph depicted the cash found in Manson's wallet, the prosecutor asked him if he recalled how much was in the wallet. RP 146. Officer Maiuri answered, "around six hundred dollars." RP 146. At no point did defense counsel object to this line of questioning.

Inexplicably, defense did not object. The wallet and its contents, including the cash, was admitted. RP 306. Only after closing arguments and after the jury had been excused for deliberations did defense counsel request that this evidence be withdrawn. RP 500-01. "The more I thought about it," defense counsel said, "the more convinced I am it doesn't help the trier of fact in any way, shape or form." RP 501. That request was denied. RP 502.

The state presented Officer Harris, who testified that the estimated street value of 9.2 grams of heroin would be between $450.00 and $720.00. RP 341-42.

The state presented no testimony supporting a finding that Manson had constructive possession over the heroin baggie found on the parking strip. There was no testimony that Manson had the ability to take immediate actual possession from inside his vehicle of the substance which was outside on the grass on the other side of the vehicle. There was no testimony that Manson had the capacity to exclude others from possession of that substance outside his vehicle. There was no testimony that Manson had dominion and control over the parking strip where the heroin was located.

Consistent with that lack of testimony, the state did not argue that Manson constructively possessed the heroin. During closing, the state said:

> One of the instructions read to you, and I believe it was Number 6, has to do with possession being actual or constructive. And you heard the judge read it to you and you

> will be able to look at it again in the jury room. The State is telling you right now, we are not relying, we are not arguing using the constructive possession at all.
>
> That means, you know, the stuff that was found in the car; the scales, the spoon, the boot, the socks, even a needle . . . those are items that were in his constructive possession. What that means is they were somewhere he had access to them, had some dominion and control . . .
>
> [Y]ou can ignore the constructive possession language.

RP 468-69.

Despite the lack of substantial evidence supporting a finding of constructive possession, the instruction given submitted the constructive possession issue to the jury. CP 51. Neither the defense nor the state took exception to this instruction. RP 456.

The jury found Manson guilty of VUCSA – possession of heroin. CP 59. Manson was sentenced to 300 days of confinement, 12 months of community custody, required to obtain a chemical dependency evaluation and to complete all program requirements, and give a DNA sample. CP 63-65.

Manson timely appeals. CP 73-74.

C. ARGUMENT

1. FLAGRANT AND ILL-INTENTIONED PROSECUTORIAL MISCONDUCT, WHICH OCCURRED DURING THE STATE'S PRESENTATION OF ITS CASE, DEPRIVED MANSON OF A FAIR TRIAL.

Prosecutors are officers of the court and have a duty to ensure that the defendant receives a fair trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). When prosecutorial misconduct affects the jury's verdict, the misconduct violates the accused's rights to a fair trial and to an impartial jury. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

"A prosecutor has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider." State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). When a prosecutor violates a judicial ruling excluding evidence, it constitutes flagrant and prejudicial misconduct. State v. Smith, 189 Wash. 422, 428-29, 65 P.2d 1075 (1937); State v. Stith, 71 Wn. App. 14, 22-23, 856 P.2d 415 (1993).

In Smith, the trial court granted the defense motion in limine prohibiting the prosecutor from examining Smith about his dishonorable discharge from military service because of its prejudicial impact. 189 Wash. at 428. The prosecutor proceeded to cross-examine Smith about his discharge anyway and defense counsel failed to object. Id. at 428-29. The

court held the prosecutor's actions were "highly prejudicial" and, "in view of the deliberate disregard by counsel of the court's ruling, prejudice must be presumed." Id. at 428-29. Thus, the court reversed and remanded for a new trial.

In Stith, likewise, the prosecutor argued in closing that Stith "was just coming back and he was dealing again," suggesting that Stith had prior drug convictions even though the trial court had specifically excluded such evidence. 71 Wn. App. at 21-22. Defense counsel objected and the trial court gave curative instructions. Id. at 22. The Court of Appeals nevertheless reversed, concluding the misconduct was "so prejudicial" that "[o]nce made, such remarks cannot be cured," and remanded for a new trial. Id. at 22-23.

State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2009), is also instructive. The trial court permitted the State to elicit evidence of physical abuse only if the defense opened the door by placing the alleged victim's delayed reporting at issue. Id. at 747. The prosecutor disregarded this directive, mentioning physical abuse in opening statement and introducing evidence of it during the State's case-in-chief. Id. The Washington Supreme Court held the prosecuting attorney "contravened the trial court's ruling by impermissibly using the physical evidence" for propensity in violation of ER 404. Id. at 748-49. The court took care to note that "given the nature of the

misconduct and the fact that the prosecuting attorney was well aware of the trial court's ruling and Fisher's standing objection, we do not believe that any limiting instruction could have neutralized the prejudicial effect." Id. at 748 n.4. The court therefore reversed and remanded for a new trial.

These cases require reversal here based on the prosecutor's almost identical flagrant and ill-intentioned misconduct. Defense moved to exclude reference to or photographs of the cash found in Manson's wallet inside the vehicle. RP 280. The prosecutor assured defense that it did not "plan on showing any evidence, photos of money." RP 280. The state repeated: "I said I am not offering the cash." RP 281. The trial court concluded: "So I think that takes care of that." RP 281. During direct testimony of its primary officer witness, however, the state inexplicably presented to the jury evidence which was specifically excluded. RP 306-06.

The state's complete disregard of the trial court's rulings and its dishonesty towards both the court and defense in disclosing what evidence it would be presenting constituted flagrant and ill-intentioned misconduct. "Prosecutors owe a duty to defendants to see that their rights to a constitutionally fair trial are not violated." Monday, 171 Wn.2d at 676. Deceiving the defense regarding the crucial question of what information will be presented to a jury prevents the defense from adequately and appropriately preparing a defense and theory. The state unambiguously

assured defense and the court that it would not be introducing specific evidence that, soon after those assurances, it introduced. This was flagrant and ill-intentioned misconduct under Smith, Stith, and Fisher. And, "in view of the deliberate disregard by counsel of the court's ruling, prejudice must be presumed." Smith, 189 Wash. at 428-29.

2. MANSON'S LAWYER PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO OBJECT TO THE PROSECUTOR'S EGREGIOUS MISCONDUCT

Alternatively, defense counsel rendered ineffective assistance of counsel when he failed to object to the prosecutor's flagrant and ill-intentioned argument.

The Sixth Amendment and article I, section 22 guarantee effective assistance of counsel. To establish a claim for ineffective assistance, counsel's performance must have been deficient and the deficient performance must have resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness." State v. Yarbrough, 151 Wn. App. 66, 89, 210 P.3d 1029 (2009). If counsel's conduct demonstrates a legitimate strategy or tactic, it cannot serve as a basis for an ineffective assistance of counsel claim. Id. at 90. "Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome [of trial] would have differed." Id.

Defense counsel's performance was objectively deficient here. There was no question whether the prosecutor had violated the motions in limine—he had done exactly what he assured the court and defense that he would not do. Defense counsel's failure to object to this misconduct until after the jury had begun deliberations with the evidence in question, even when he was required to so object to preserve the issue of prosecutorial misconduct for review, fell well below an objective standard of reasonableness. Counsel's failure to object to serious misconduct constitutes ineffective assistance and justifies examining the error on appeal. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980).

No strategy or tactic could explain counsel's failure to object. The large amount of cash in Manson's wallet was the only potential link between Manson personally and the large amount of heroin recovered outside of the vehicle. Defense counsel repeatedly fought to exclude the evidence in question. RP 41-42, 280. He then failed to object to its admission. The record indicates that the delay in objecting was simply a delay in counsel's analysis of the impact of this evidence ("The more I thought about it, the more convinced I am it doesn't help the trier of fact in any way, shape or form." RP 500.). Even if the court had somehow granted counsel's motion to withdraw the exhibit, the jury still would have seen and heard about the contents of the wallet. Given that counsel fought to keep this evidence out

and only objected after both parties had rested, counsel's failure to make a timely objection constituted objectively deficient performance.

Counsel's deficient performance prejudiced Manson. By failing to object, defense counsel permitted the possibility of the jury inferring Manson's possession of the large amount of heroin, worth between $450-$720, through the large amount of cash (estimated to be $600) found in his wallet. This permitted the state to fill a gaping hole in the presentation of its case, as the cash in Manson's wallet was the only piece of potential evidence directly tying Manson to the heroin; the spoon and scale were merely present in a vehicle that did not belong to him. RP 313. On the other hand, his wallet contents, which were admitted for the jury to inspect, related to Manson himself. RP 306. Within a reasonable probability, counsel's deficient performance in failing to object to the prosecutor's flagrant and ill-intentioned misconduct changed the outcome of trial. Because Manson received ineffective assistance of counsel, this court should reverse.

3. MANSON'S LAWYER PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO OBJECT TO ADMISSION OF EVIDENCE OF MANSON'S PRIOR CONTACT WITH OFFICERS AND HIS ACTIVE WARRANT

Defense counsel's performance was also objectively deficient for failing to move to exclude testimony regarding Manson's prior contact with officers and his active warrant. While being wholly irrelevant to the question

of Manson's possession of heroin on October 5, 2015, officers repeatedly testified that they recognized Manson and that Manson had an active DOC warrant out for his arrest. RP 284. Officer Maiuri testified that he recognized Manson and "pulled up next to him and told him to pull over because I knew he had a warrant for his arrest." RP 284. He repeated: "I knew he had a warrant or at least a warrant hit. We get lists of people with warrants." RP 285. He continued: "And at this point I was telling him that he had a warrant for his arrest that we were checking on." RP 285. And again: "[A]t that point with the handcuffs on I went ahead and told him he was under arrest, that the warrant was confirmed." RP 291. Maiuri also testified that he "advised the other officer, you know, that he – the warrant was confirmed . . ." RP 292.

The most concerning testimony perhaps came from Officer Huxoll, who in response to the prosecutor's question why he sought consent to search Manson's vehicle replied, "I know Mr. Manson from previous contacts." RP 417. None of these statements by either officer was objected to by defense counsel. Defense counsel made no attempt before testimony began to exclude them.

Counsel's deficient performance prejudiced Manson. In failing to move to exclude this evidence or offer to stipulate to the lawfulness of the stop and/or detention of Manson, the jury heard over and over again that Manson was no stranger to law enforcement. In a case where Manson's guilt

hinged on the jury's association between Manson and the heroin found outside of his vehicle, this information would have been particularly prejudicial. Certainly, Officer Huxoll's statement that he wanted to search the vehicle because he knew Manson from previous contacts hinted that he believed he would find contraband in the vehicle. Had the jury not heard evidence of prior contacts or of Manson's active warrant, there is a reasonable probability that the outcome of the trial would have been different. Because Manson received ineffective assistance of counsel, this court should reverse.

4. MANSON'S LAWYER PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO REQUEST AN INSTRUCTION TO THE JURY LIMITING ITS CONSIDERATION OF MANSON'S ACTIVE WARRANT AND PRIOR CONTACTS WITH OFFICERS

Defense counsel's performance was also objectively deficient for failing to request a limiting instruction. Generally, where an attorney fails to request a limiting instruction regarding a prior conviction, courts presume that the omission was a tactical decision to avoid reemphasizing prejudicial information. State v. Humphries, 181 Wn.2d 708, 720, 336 P.3d 1121 (2014); State v. Price, 126 Wn. App. 617, 649, 109 P.3d 27 (2005). But that presumption is overcome when defense counsel made no attempt whatsoever to exclude the admission of such information in the first place.

In Humphries, the defendant was charged with first degree unlawful possession of a firearm based on multiple juvenile convictions for robbery that rendered him ineligible to possess a firearm. Id. at 712. Defense counsel made the tactical decision of agreeing to stipulate that Humphries had been convicted of a "serious offense" because he did not want the jury to hear about the underlying convictions. Id. No limiting instruction was given to the jury. Id.at 713. The court held that the failure to request the instruction was presumed tactical and Humphries had not shown that the failure fell below an objective standard of reasonableness. Id. at 720.

In Price, the state introduced five prior incidents of domestic violence involving the defendant and the alleged victim. Id. at 649. Price's attorneys objected to the admission of the evidence under ER 404(b). Id. A limiting instruction was only requested for one out of the five prior incidents, and Price alleged ineffective assistance of counsel after he was convicted. Id. at 632, 649. The court characterized counsel's decision to not request a limiting instruction for all five incidents as a trial strategy. Id.

This case is unlike Humphries and Price. Not only did defense counsel fail to request a limiting instruction, he also failed to make any attempt whatsoever to exclude evidence of prior contact with police officers or Manson's active DOC warrant before the jury was exposed to the information. Unlike Humphries, there was no tactical benefit to allowing this

evidence or agreeing to stipulate to its admission. Unlike Price, defense counsel made no attempt to exclude this evidence, thereby preserving the issue for appeal. It should come as no surprise that defense counsel also failed to request a limiting instruction.

Despite the presumption that failing to request a limiting instruction is tactical, this presumption is overcome when the facts show defense counsel was asleep at the wheel. Making no attempt to exclude evidence of an active warrant and prior contact with law enforcement in a case where the defendant's possession of a controlled substance is in question was unreasonable and without purpose. Defense counsel's performance fell below an objective standard of reasonableness and was therefore deficient.

Counsel's deficient performance prejudiced Manson. In failing to request a limiting instruction, defense counsel permitted the possibility of the jury inferring Manson's ownership of the heroin in question through prior contacts with police and an active warrant. Had the jury been instructed to consider such information solely for the purpose of determining that the stop and arrest of Manson was appropriate, there is a reasonable probability that the outcome of the trial would have been different. Because Manson received ineffective assistance of counsel, this court should reverse.

5. OFFERING A POSSESSION INSTRUCTION TO THE JURY WHICH INCLUDED LANGUAGE REGARDING CONSTRUCTIVE POSSESSION CONSTITUTED AN IMPERMISSIBLE COMMENT ON THE EVIDENCE

Where there was insufficient evidence in the record to support a constructive possession theory, the offering of a constructive possession instruction constituted an impermissible comment on the evidence. Article 4, section 16 of the Washington Constitution prohibits a judge from conveying to the jury his or her personal belief in the merits of the case. State v. Hughes, 106 Wn.2d 176, 193, 721 P.2d 902 (1986). It is prejudicial error to submit an issue to the jury when there is not substantial evidence concerning it. Id. at 191 (citing Albin v. National Bank of Commerce of Seattle, 60 Wn.2d 745, 754, 375 P.2d 487 (1962) ("the giving of the instruction indicates to the jury that the court must have thought there was some evidence on the issue")). Washington courts consistently follow this rule. See Columbia Park Golf Course, Inc. v. City of Kennewick, 160 Wn. App. 66, 90, 248 P.3d 1067 (2011); State v. Heath, 35 Wn. App. 269, 271, 666 P.2d 922 (1983); State v. Brown, 29 Wn. App. 11, 17, 627 P.2d 132 (1981).

A constructive evidence theory was not supported by substantial evidence and offering the instruction was prejudicial error. The state presented no testimony supporting a finding that Manson had constructive possession over the heroin baggie found on the parking strip. There was no

testimony that Manson had the ability to take immediate actual possession from inside his vehicle of the substance which was outside on the grass on the other side of the vehicle. There was no testimony that Manson had the capacity to exclude others from possession of that substance outside his vehicle.

There was no testimony that Manson had dominion and control over the heroin found on the parking strip. Constructive possession is proved when it can be said that a person has dominion and control over the property allegedly possessed. State v. Walcott, 72 Wn.2d 959, 968, 435 P.2d 994 (1967). Whether an individual has dominion and control over property depends on the totality of the circumstances. State v. Jimenez-Macias, 171 Wn. App. 323, 332, 286 P.3d 1022 (2012). There must be substantial evidence to show dominion and control in order to find constructive possession. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Mere proximity cannot establish dominion and control. State v. Davis, 182 Wn.2d 222, 234, 340 P.3d 820 (2014). Ownership of the premises can support a finding of dominion and control but even that is insufficient on its own. Id.

In State v. Callahan, the court held that the defendant was not in constructive possession of drugs found in the houseboat where she was temporarily residing, even when the drugs were in close proximity to her and she admitted to handling them momentarily. 77 Wn.2d at 31. In State v.

Chavez, the court found facts insufficient to support a finding that the defendant was in constructive possession of cocaine even where an officer heard a snorting noise coming from a bathroom stall, the defendant was found in the stall with two other individuals, one man quickly left the stall upon seeing the officer, and one of the men was holding a dollar bill with a white powdery substance on it. 138 Wn. App. 29, 35, 156 P.3d 246 (2007). However, in State v. Potts, the defendant was found to be in constructive possession of marijuana located inside his car. 1 Wn. App. 614, 618, 464 P.2d 742 (1969). In State v. Bowen, the defendant was found to be in constructive possession of a firearm located inside his car. 157 Wn. App. 821, 828, 239 P.3d 1114 (2010). In State v. Dodd, the defendant was found to be in constructive possession of marijuana located inside his car. 8 Wn. App. 269, 274, 505 P.2d 830 (1973).

Manson lacked dominion and control over the heroin found on the parking strip. Unlike Potts, Bowen, and Dodd, the contraband was not found in an area over which he exercised ownership. And unlike Callahan, where the court found insufficient evidence of constructive possession, Manson did not reside on the premises where the contraband was found nor did he admit to handling it, however briefly. Unlike Chavez, again where the court found insufficient evidence of constructive possession, Manson was not found in an enclosed space with the contraband or in close proximity to drug

paraphernalia with residue. Considering this dearth of evidence of constructive possession, the state understandably did not pursue a constructive possession theory, arguing actual possession instead. RP 468-69.

The offering of an instruction with a constructive possession alternative to actual possession therefore constituted an impermissible comment on the evidence. It informed jurors that the state had presented evidence of constructive possession when it had not. Submitting this issue to the jury without substantial evidence to support it constituted prejudicial error. Albin, 60 Wn.2d at 754.

6. IF THE ABOVE ERRORS ALONE DO NOT WARRANT REVERSAL, THEIR CUMULATIVE EFFECT DOES

Courts reverse a conviction for cumulative error "when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). There were several errors in this case, which include flagrant and ill-intentioned prosecutorial misconduct resulting in the admission of excluded evidence and submitting the constructive possession issue to the jury when a constructive evidence theory was not supported by substantial evidence. Additionally, Manson's lawyer provided ineffective assistance of counsel when he failed to object to

the prosecutor's egregious conduct, failed to object to the admission of Manson's prior contact with officers and his active warrant, and failed to request an instruction to the jury limiting its consideration of Manson's active warrant and prior contact with officers. If this court determines that, individually, these errors do not require reversal of Manson's conviction, it should conclude that, when taken together, these errors deprived Manson of a fair trial and their cumulative effect requires reversal.

D. CONCLUSION

Flagrant and ill-intentioned prosecutorial misconduct deprived Manson of a fair trial, necessitating reversal of this conviction and retrial. Manson's lawyer provided ineffective assistance of counsel when he failed to object to flagrant and ill-intentioned prosecutorial misconduct and to the admission of prior contacts between police and Manson, his active warrant, and when he failed to request a limiting instruction. In addition, offering a possession instruction to the jury which included language regarding constructive possession constituted an impermissible comment on the evidence, requiring reversal.

DATED this 26th day of May, 2017.

Respectfully submitted,

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No. 35004-5-III

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Cause No. 35004-5-III, in the Court of Appeals, Division III, for the state of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

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Date
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